In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1471

JOHN PENSEC, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on one count of having conspired to misapply funds of a federally insured bank, in violation of 18 U.S.C. 371, and on three counts of having misapplied such funds, in violation of 18 U.S.C. 656 and 2. He was sentenced to seven months' imprisonment on each count, the terms to run concurrently. The court of appeals affirmed on February 9, 1972 (Pet. App.). The petition for a writ of certiorari was not filed until May 10, 1972, and is therefore substantially

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out of time under Rule 22(2) of the Rules of this Court. There is, in any event, no reason for further review.

The facts of the case, which are not in dispute, are set forth in the opinion below (Pet. App. 3–8). Petitioner's principal contentions here are that the indictment failed to define sufficiently the statutory word "misapplication," and that the trial court improperly instructed the jury as to the meaning of that word. The same arguments were made in the court of appeals and have been adequately answered in the opinion below, upon which we rely here (Pet. App. 10–13).[1]

Petitioner also argues that the trial court erred in instructing the jury that it could infer the requisite intent from a finding of gross and reckless disregard

[1] Petitioner claims that the decision below is in conflict with decisions in the First, Fourth and Seventh Circuits in that it upholds an indictment, the substantive counts of which "fail to state the manner in which the misapplication of bank funds is alleged to have been accomplished" (Pet. 11). Even assuming *arguendo* that such a statement is indeed required in those circuits, however, this case does not hold to the contrary. Here, the scheme to misapply bank funds was explained in the indictment. As the court of appeals correctly observed (Pet. App. 11–12): "In this case we have an indictment wherein the first count charges and sets forth an elaborate conspiracy to misapply bank funds. The following three counts, those at issue here, name the same defendants involved in the conspiracy and charge that during a stated time period, Moraites and [petitioner] wilfully misapplied bank funds in that they caused loans to be made in a stated total amount to a named recipient. * * * Counts 2, 3 and 4 of the indictment meet the requirements of Rule 7(c) of the F.R.Crim.P. and * * * the district court did not err in refusing to dismiss them."

on his part for the consequences of his acts. The court charged (Tr. 2639–2640):[2]

> Now, I also instruct you that maladministration or bad administration, if I can call it that, of a bank's affairs through ineptitude or inexperience or incompetence or carelessness or mere negligence is not a basis for finding that the defendant John Pensec criminally misapplied the funds of the bank, and when I say "criminally" I am referring, of course, to a wilful misapplication with intent to injure and defraud the bank, as I have defined it. Unless you find that the maladministration or bad administration of the bank's affairs by the defendant, John Pensec, if in fact you do find maladministration by him, that would be for you to find, was the result of gross and reckless conduct on his part in the operation of the bank so as to constitute a gross and reckless disregard for the consequences of his acts so that from such gross and reckless activity you can infer that there was a wilful misapplication of the bank's funds with an intent to defraud and injure the bank, you may not find the defendant, Pensec, guilty under Counts 2, 3 or 4, nor can you impute to the defendant Pensec a criminal intent merely because he failed to perform his duties carefully. Unless you find that the defendant's carelessness was so gross that it in effect was reckless or was

[2] "Tr." refers to the transcript of the trial proceedings. A copy of that portion of the transcript containing the court's instructions is included in the Joint Appendix filed in the court of appeals, which we are lodging with the Clerk of this Court.

> motivated by a corrupt intention—in other words, what I am telling you is that mere bad administration is not enough to find the defendant guilty under Counts 2, 3 and 4 even if it is proved. There must be something more than bad or maladministration. There must be, as I have informed you and instructed you, wilful misapplication of the bank's funds with the intent to defraud or injure the bank, and such proof, as with all other proof, must satisfy you behond [*sic*] a reasonable doubt of the defendant's guilt if you are to find him guilty.

This instruction, to which no objection was made, was thorough and accurate. It is essentially the same as that used in other circuits. See *Giragosian* v. *United States,* 349 F.2d 166, 168–169 (C.A. 1); *Logsdon* v. *United States,* 253 F.2d 12, 15 (C.A. 6); *Mulloney* v. *United States,* 79 F.2d 566, 584 (C.A. 1), certiorari denied, 296 U.S. 658. There is thus no cause for further review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1972.

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